In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 78

UNITED STATES OF AMERICA,

Petitioner,

vs.

VICTOR N. MILLER, also known as Vic Miller; JOHN J. HUMPHREY, also known as John J. Humphrey, Sr., also known as J. M. Humphrey; CHARLES J. McCONNELL, also known as Chas. J. McConnell; ELMER JOHNSON and HILMA JOHNSON (his wife); DAVID WILSON AGNEW, ALBERT ROUGE and FLORENCE VAN SANTEN,

Respondents.

BRIEF FOR RESPONDENTS.

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OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported in 125 F. (2d) 75. In the District Court no opinion was filed.

JURISDICTION.

In the Circuit Court of Appeals judgment was entered January 22, 1942, reversing the judgment of the District Court. A writ of certiorari was granted herein June 1, 1942 (R. 478), upon the application of the United States.

STATUTES INVOLVED.

U. S. C. A. Title 40, Sec. 258a, 46 Stat. 1421-1422; printed in the appendix, infra;

U. S. C. A. Title 40, Sec. 258;

U. S. C. A. Title 33, Sec. 595.

QUESTIONS PRESENTED.

The statement of questions presented that is found in petitioner's brief does not reflect all the features that enter into a consideration of the merits of the judgment of the court below, and we believe it is fair to break down the questions presented as follows:

(1) Whether, in cases where property is taken by the Federal Government for a public improvement in eminent domain, the standard of the just compensation that must be paid to the owners by the Government is to be measured by a different standard from that which governs the taking of private property for public use in eminent domain by other condemnors, by excluding any increase in value due to the announcement of the federal project; or,

(2) Did the Circuit Court of Appeals correctly decide that the respondent landowners should receive as com-

pensation for the lands taken the full market value of those lands as of the date of taking?

(3) Whether, assuming the *Shoemaker* case may be construed as petitioner contends, said decision has any proper application to the Central Valley Project which was not originally announced by the Government but was first undertaken and publicized by the State of California and authorized by the people of that State in a general election and there is no showing that any increase in the value of property was attributable to the Act of Congress of August 26, 1937?

(4) Whether, assuming that any increase in value due to the announcement of a public project for which land is later condemned by the Government is to be excluded in fixing the compensation to be paid to the owners, the mode of procedure enforced by the District Court in this case at the instance of petitioner was the proper mode of ascertaining and fixing the amount of such compensation, absent any evidence that such an increase in value had occurred, or any proof from which the amount of the supposed increase could be ascertained?

(5) Whether the general benefits accruing to a community from the announcement of a public improvement should be charged against the individual landowner in fixing the damages recoverable in eminent domain, or does not the Act of Congress (U. S. C. A. Title 33, Sec. 595) govern the mode and measure of any offset for benefits that is to be charged against the damages recoverable by landowners in proceedings such as this, instituted by the Government to condemn property for the improvement of rivers, etc.?

(6) Whether the Government was entitled to recapture and recover by summary judgment the amounts, over and above the jury awards, that had been deposited in the court with the declaration of taking when title to respondents' lands was taken, and had been paid to respondents Miller, Humphrey and McConnell, under sanction of statute, by order of the District Court?

(7) Did the Circuit Court of Appeals correctly decide that the judgment of the District Court should be reversed?

(8) Did the District Court err in ruling that witnesses testifying as to value should exclude from consideration any increase in value due to the Central Valley Project after August 26, 1937?

(9) Did not the District Court err in ruling that witnesses testifying as to value should exclude from consideration any increase in value due to the Central Valley Project after August 26, 1937, when no evidence was produced at the trial showing that any such increase in value had occurred?

(10) Did the District Court err in charging the jury that in fixing the compensation to be awarded to respondents, any increase in value after August 26, 1937, attributable to the project should not be considered?

(11) Did not the District Court err in charging the jury that in fixing the compensation to be awarded to respondents, any increase in value after August 26, 1937, attributable to the project should not be considered when there was no evidence before the jury showing the amount of any such increase, or that any such increase had actually occurred?

(12) Did the District Court err in failing to conform to the state practice and modes of procedure and proof as applied to the trial and determination of like causes in the State of California?

STATEMENT.

This action was filed by the Government, petitioner here, upon application of the Secretary of the Interior, to condemn and acquire title in fee simple to several parcels of land for a right of way for the relocation of the main line of the Central Pacific Railroad between Redding and Delta, in Shasta County, California. Such relocation of the railroad was an essential feature of the Central Valley Project, originally undertaken by the State of California, and subsequently authorized by the Congress as a federal reclamation project, due to the fact that the reservoir to be impounded by the Shasta Dam of said project would flood a part of the existing right of way of the railroad.

The several Acts of Congress leading to the authorization and construction of said project are cited in the brief for the United States, and are epitomized in the marginal notes which accompany the published reports of the decision of the Circuit Court of Appeals (125 F. (2d) 75), so it seems quite unnecessary to repeat them here.

The Government filed its amended complaint in the District Court on December 14, 1938, and on the same date a declaration of taking in accordance with the Act of Congress (U. S. C. A. Title 40, Section 258a) was filed by the Acting Secretary of the Interior, and a judgment upon said declaration of taking was made and entered in the

District Court. (R. 23-34.) By said judgment on declaration of taking it was decreed that the title to the lands sought to be condemned, in fee simple absolute, was vested in the United States of America and was condemned and taken for the use of the United States. (R. 36.)

Following the filing of said declaration of taking and the entry of said judgment based thereon, petitioner took possession of the properties in question, and commenced the work of construction for said line of railroad, making cuts and fills, and erecting an underpass which entirely changed the configuration of the land before the trial, and before it was viewed by the jury.

There was some testimony that in March, 1936, the probable center line of the relocated railroad was marked on the ground by stakes (R. 169), but it was also shown that several survey lines were later run for the proposed railroad (R. 177) and the evidence does not show its exact location was finally fixed until this action was filed. The witness Mellin who gave this testimony was the chief Right-of-Way Agent and engineer for the Government at the time of the trial, but on cross-examination it was developed that his employment with the U. S. Bureau of Reclamation commenced on April 1, 1936 (R. 171), prior to which time he was employed on the Central Valley Project by the State of California (R. 171-173), and the preliminary survey work in connection with the project was done for the state.

Originally the action was brought for the condemnation of seven (7) separate parcels of land held in seven (7) different ownerships. Before the trial of the action settlements of compensation were made with the owners of

parcel No. 2 and parcel No. 3 of the lands condemned; and no appeal was taken from the judgment in respect to parcel No. 5. Thus, there are four parcels of the lands described in the amended complaint which are involved in this proceeding.

Answers were filed by the several respondents (R. 39-68) raising issues as to the value of the lands taken and the severance damages suffered by respondents.

Respondents' lands were situate within a business and residential district colloquially known as "Boomtown", which had been settled and developed before the amended complaint and declaration of taking in this action was filed. It is located on the main thoroughfare to and from the site of Shasta Dam, about four miles distant.[1]

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[1]Following is a brief summary of the parcels of land involved on this appeal from the judgment:

Parcel No. 1. This parcel comprises 3.17 acres (R. 7-10) and is owned by the following appellants respectively, as follows: Miller and Humphrey (two-thirds interest) 3.11 acres; Albert Rouge .047 acre; Florence Van Santen .0125 acre. The entire parcel, 3.17 acres, was a portion of a larger tract consistng of approximately 520 acres, as alleged in the amended complaint (R. p. 9); the tract of 3.11 acres had been subdivided.

Parcel No. 4. This tract consisted of 4.81 acres and is owned by appellants Elmer Johnson and Hilma Johnson. It was a part of a larger tract containing approximately 40 acres, as alleged in the amended complaint (R. 13), and the testimony showed that said lands, which Johnson acquired in June, 1937, were adaptable for subdivision and residence purposes. Said respondents claimed a value of $600.00 per acre for the land taken and $5000.00 severance damages.

Parcel No. 6. This parcel is owned by appellant Agnew, and consists of a portion of three lots upon which said appellant had erected valuable improvements. He purchased the property in June of 1938, at which time the general information was that the proposed right of way for the relocation of the railroad would be some distance from said lots. Previous to purchasing said lots Agnew had no interest in the area known as Boomtown. It was shown at the trial that shortly before the amended complaint

Prior to trial, upon application of the respondents Miller, Humphrey and McConnell, as owners of parcel No. 7 (R. 69), the District Court made an order (R. 72), authorizing the payment to each of them of $850.00, one-third of the amount deposited in court with the declaration of taking for the "use and benefit" of the owners of said tract. (R. 33.) Said application and order were authorized by the Declaration of Taking Act, 46 Stat. 1421, U. S. C. A. Title 40, Sec. 258a.

The cause came on for trial in the District Court at Sacramento, California, on January 20, 1940, upon the issues as to the value of the lands taken and the amount of severance damages suffered by the several respondents.

In the District Court petitioner contended that in the determination of the compensation to which respondents

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herein was filed the Government increased the width of the proposed right of way fifty (50) feet thus bringing the railroad fifty feet closed to the Agnew property and so close to his buildings as to interfere with the practicable use of same. Severance damages in the sum of $15,000.00 were claimed by this respondent, the same being specially pleaded in his answer. (R. 55-6.)

Parcel No. 7. This tract of land is owned by appellants Charles J. McConnell, Victor N. Miller and John J. Humphrey. It comprises 10.61 acres, and was a part of a larger tract of land described in the amended complaint (R. 20) consisting of approximately 113 acres. A large portion of said 10.61 acres was situate within the subdivision known as Boomtown Unit No. 4, and was suitable for lots for business and residence purposes. The damage by severance was palpably substantial. The property had a frontage on the main business thoroughfare leading to Shasta Dam known as "Grand Coulee Boulevard" and adjacent to it were many of the lots in said subdivision.

This was the parcel of land for which the Government deposited $2550.00 with the declaration of taking, and for which the jury awarded only $600.00, i.e., $500.00 for the land taken and $100.00 for severance damages. In their several answers said respondents alleged that the value of the land taken at the date of taking was $25,000.00; and that they suffered severance damage to the amount of $15,000.00.

were entitled, the value of their respective lands, and the severance damages suffered through the taking thereof, were to be ascertained and fixed by the jury according to the value on the date of taking, excluding therefrom any increase or increment arising from the Central Valley Project from and after August 26, 1937. Illustrative arguments of counsel for the Government in the District Court and the form of testimony that was allowed are shown in the appendix, infra.

This position on the part of petitioner was sustained and followed by the district judge in his rulings on evidence and in his charge to the jury. Exceptions to these rulings were reserved.

As a matter of fact, the trial court frequently sustained objections to valuation testimony made by counsel for the Government, when such objections were based upon the ground that any increase in value due to the Central Valley Project, no matter when it arose, was not excluded irrespective of whether such increase in value arose before or after August 26, 1937. (R. 299, 323, 337, 342, 351-2, 353.)

As a result of the rulings of the District Court, respondents were precluded from introducing evidence as to the value of their several parcels of land at the date of taking, viz.: December 14, 1938, or evidence as to the damage to the portions of their land not taken as of said date; and the Government, over respondents' objections, was permitted to introduce valuation testimony from which the witnesses excluded "any increase or increment due to the Central Valley Project from and after August 26, 1937". (R. 367-369, 406-407.) Also, the court charged the jury that in fixing the compensation to be awarded to respond-

ents it should not consider any increase in the value of the lands which may have occurred after August 26, 1937, that was attributable to the announcement of plans for or on the construction of the project. (R. 428-29.)

There was no evidence introduced at the trial which showed that there had been any increase in the market value of respondents' lands due to the Central Valley Project after August 26, 1937; and the amount of such increase, if any had occurred, was a matter of conjecture, which witnesses and jurors alike were required to imagine and appraise, without any basis in the testimony, under the rulings and instructions of the trial court.

By the rulings of the District Court, made at the instance of petitioner, the respondents were required to submit their cause and have the compensation for their respective lands determined without any proof going before the jury to show the value *at the date of taking*. It is fair to say that actually there was no trial of the real issues in the case, tendered by the pleadings, viz.: the value of each of the parcels of land condemned on December 14, 1938, and the damages, if any, as of December 14, 1938, to the remaining portions of the lands of appellants by reason of the taking.

An incorrect and misleading statement concerning evidence offered by respondents at the trial is found in petitioner's brief, page 6, where it is stated:

> "At the trial respondents sought to introduce evidence of sales of land prior to December 14, 1938, in the vicinity of the land in suit (R. 231)."

Manifestly counsel for petitioner have misinterpreted a question[2] propounded to the witness Humphrey, respondent, and have misjudged our purpose in asking the question. It was intended merely to develop the qualifications of the witness to give opinion evidence as to values in the vicinity, not to show sales of land; for such testimony would not be competent. According to the long-established rule in California, evidence of sales of other lands is not admissible as evidence in chief in the trial of eminent domain cases, but only on cross-examination for the purpose of testing the witness' knowledge and the value of his opinion. (*Central Pacific R. Co. v. Pearson*, 34 Cal. 247; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528; *Reclamation Dist. v. Inglin*, 31 C. A. 495; *City of Los Angeles v. Hughes*, 202 Cal. 731.)

There was no intention on the part of respondents or their counsel to breach or evade said rule in the trial of this cause.

The existence of said rule is overlooked, also, in the later comment made in the same paragraph of petitioner's brief that "Respondents did not offer any evidence concerning sales in the vicinity made before August 26, 1937". Such proof being precluded by the rule, its absence is not to be regarded as an omission of any requirement of the case for respondents.

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[2]The Question:

"Q. Now, then, did you yourself make sales of parcels of real estate—answer this Yes or No—in that vicinity?

A. Yes, in——

The Court. Fix the time.

Mr. Goldstein. Q. Prior to December 14, 1938." (R. 231.)

By the verdict of the jury absurdly low awards of compensation and damages were made to the respondents.[3] The verdict was returned and filed on February 10, 1940 (R. 112), but the judgment of the Court, prepared by counsel for the Government, was not entered until May 15, 1940. (R. 126.)

By the verdict of the jury the respondents Miller, Humphrey and McConnell were awarded $500.00 for their land (Parcel No. 7) and $100.00 severance damages. By its judgment the District Court, without notice to said respondents or any proceeding to vacate the order it had previously made directing the payment to said respondents of the $2550.00 deposited with the declaration of taking, summarily entered judgment against each of said respondents for $650.00. (R. 124-125.)

Following the entry of judgment motions to modify, amend, and/or correct the judgment by vacating, annulling and deleting said awards in favor of the Government were made by said appellants McConnell, Miller, and Humphrey, and said motions were denied. (R. 126-130.)

The appeal to the Circuit Court of Appeals was taken by notice of appeal filed in the District Court in accordance with the present rule. (R. 133.)

In compliance with the rules, the appellants served and filed in the District Court their statement of points on

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[3]

	Parcel	Land Taken	Severance
Rouge	1	$ 50.00	$ 00.00
Miller, et al.	1	165.00	75.00
Van Santen	1	10.00	00.00
Johnson	4	125.00	120.00
Agnew	6	15.00	00.00
McConnell, et al.	7	500.00	100.00

appeal (R. 136) and their designation of the contents of the record on appeal. (R. 143.) Thereafter, upon the filing of the record in the Circuit Court of Appeals, appellants filed with the clerk a statement of points on appeal and their designation of the parts of the record necessary for the consideration thereof. (R. 446.)

THE SPECIFICATIONS OF ERROR IN THE CIRCUIT COURT OF APPEALS.

In the opening brief filed by respondents, appellants in the court below, in the Circuit Court of Appeals, they specified with careful detail the rulings and acts of the District Court that were assigned as error. We are setting forth these specifications of error in the appendix, infra, deleting, as far as possible, repetition and unnecessary matter.

These specifications of error are repeated here, for, as we understand the rule, it is open to this court, on certiorari to review a judgment of a Circuit Court of Appeals which reversed a judgment below and ordered a new trial, to consider grounds of appeal not considered by that court for reversing the judgment, and proceed to a complete decision. (*Cole v. Ralph*, 252 U. S. 286, 64 L. ed. 567, 40 S. Ct. 321.)

Questions of evidence and procedure, as well as questions of substantive law, were presented to the Circuit Court of Appeals by said specifications of error.

In support of their appeal to said court the respondents contended:

(1) That they were entitled to recover compensation in this proceeding according to the market value of their several properties at the date of taking, i.e., December 14, 1938;

(2) That if any benefits arising from the project were chargeable against the compensation to be awarded appellants, the same should have been measured and determined in accordance with the Act of Congress expressly relating to such cases;

(3) That no special or direct benefit to the lands of the appellants, within the meaning of said statute, was shown by the proof at the trial, and respondents were entitled to compensation according to the value at the time of taking without deduction, direct or indirect, for benefits arising from the project;

(4) That the decision of this court in the *Shoemaker* case was not authority for the limitations upon the proof of value and damages imposed by the District Court in its rulings on evidence in this case, nor authority for giving to the jury the instructions excepted to;

(5) That the District Court erred in failing to follow and apply the established practice and mode of procedure in California for the determination of the just compensation that should be paid to respondents for their properties;

(6) That the errors of the District Court in its rulings on evidence and its charge to the jury were prejudicial to respondents, as reflected in the ridiculous verdict of the jury;

(7) That as a result of the rulings of the District Court which excluded proof of the value of respondents' lands at the date of taking, there was no valid evidence in the record to sustain the verdict or the

judgment of the court as constituting a just decision as to the amount of compensation to which respondents were entitled;

(8) That in entering judgment upon the verdict the court below erred in awarding judgment to the Government for the recovery of the sum of $650.00, each, from the appellants McConnell, Miller and Humphrey, and said judgment should be annulled;

(9) That as a result of the errors of the District Court and the entry of judgment in accordance with the verdict of the jury, the respondents:

(1) Were deprived of the just compensation for their respective properties guaranteed to them under the provisions of the Constitution of the United States;

(2) Were deprived of their respective properties without due process of law in violation of their rights, privileges and immunities under the provisions of the Constitution of the United States.

The Circuit Court of Appeals, Judge Garrecht dissenting in part, held that respondents should receive as compensation for the lands taken the full market value of such lands at the date of taking (R. 475); that the District Court was without jurisdiction to award judgment to the Government against respondents Miller, Humphrey and McConnell for the recovery of the amounts, in excess of the verdict, which had been paid to them under order of the court, as authorized by the Declaration of Taking Act (R. 468); and the cause was remanded to the trial court for further proceedings consistent with the opinion.

SUMMARY OF ARGUMENT.

I.

To exclude from the compensation for lands condemned for public use any increase in the value of said lands resulting from the announcement or authorization of the public improvement, for which the lands are later taken, deprives the property owner of the compensation which this court as uniformly held is guaranteed to him by the Fifth Amendment. The decisions interpreting said provision of the Constitution in cases where property has been taken for public use by the Federal Government are uniform in holding that value at the time of taking is the measure of just compensation; and this court has frequently defined such compensation as being the "full equivalent of the value of the property at the time of taking paid contemporaneously with the taking".

If the contention of petitioner is upheld, that any increase in the value of the property resulting from the announcement of the project for which it is taken should be subtracted in fixing the compensation to be paid to the owner by the Government, the result will be that in cases where property is taken by the Federal Government in eminent domain "just compensation" will have a different meaning and be something less than the "just compensation" that must be paid by other condemnors for property that is taken for public use; whereas, up to the present time, the test and measure of just compensation has been the same in all cases, whether arising under the Fifth Amendment or the Fourteenth Amendment.

To thus modify the long accepted interpretation of the Fifth Amendment will be to relax one of the essential safe-

guards of the Bill of Rights against the encroachment of federal power.

No passing considerations of public policy such as those mentioned in petitioner's brief warrant such a departure from an established principle of government.

II.

No sanction of the mode of procedure that was prescribed by the District Court to govern proof of value and severance damages, and no sanction for the rulings of said court to which respondents excepted, is to be found in the decision of this court in the *Shoemaker* case, 147 U. S. 482, 13 S. Ct. 361, 37 L. ed. 170. That express authority for said rulings of the District Court is not to be found in said decision, is apparently recognized by the counsel for petitioner, for their claim appears to be that said rulings "follow from" said decision.

Granting, for the sake of argument, that petitioner has fairly construed the decision in the *Shoemaker* case as applied to the facts of that case, nevertheless there is no sound basis for concluding from said decision that the court intended to give a new interpretation to the phrase "just compensation", or to modify its settled definition, i.e., the full equivalent of value at the time of taking. Nor has the decision since been construed by this court as having that effect.

III.

To require the exclusion of any increase in value resulting from the announcement of the project in fixing just compensation for the land that is later taken for said project is equivalent to allowing an offset for general

benefits, common to the community, against the damages suffered by the landowner by such taking. It is now the general rule that such benefits, as distinguished from special benefits, are not properly an offset against the compensation for the land taken or the damages to the remaining land.

In this case we have the additional factor that the Congress has established by statute the procedure for determining what deduction shall be made for any special or direct benefits to the remaining land in condemnation cases such as this (U. S. C. A. Title 33, Sec. 595); and said statute has been construed as holding that a general benefit, i.e., the increase in value due to the proximity of a project does not fall within the class of benefits that are to be taken into account in fixing damages. (*United States v. Alcorn*, 80 Fed. (2d) 487.)

IV.

In the trial of this cause the District Court did not conform to the state practice in California, as the federal statute governing condemnation proceedings provides, particularly in dealing with the matter of benefits and the admission and exclusion of evidence pertaining to compensation and damages.

V.

The award of judgment against the respondents Miller, Humphrey and McConnell, for the sum of $650.00 each, was an unauthorized exercise of judicial power. It was done without notice, process, or a hearing as to the right of petitioner to recapture moneys that had legally and

regularly been paid to said respondents in pursuance of the statute and an order of the District Court. No authority for such a judgment is conferred by the statute, and the award lacks the requirements of due process. Due process of law is an essential of jurisdiction and the Circuit Court of Appeals correctly held that the District Court was without jurisdiction to enter such judgment.

Aside from the element of lack of process, a proper interpretation of the statute in the light of the Fifth Amendment warrants the conclusion that under the Declaration of Taking Act the property owner is entitled to receive and retain the sum paid to him out of the deposit that is made in the registry of the court. The statute provides that such payment is "for or on account of" the just compensation, and provision is made in the case where the final award is greater than the amount received from the deposit, but there is no provision for the recapture of the money where the jury awards a sum less than the amount that has been paid. *Expressio unius exclusio alterius.* The unfavorable position of the landowner that would result from the interpretation urged by petitioner would not conform with the Fifth Amendment.

VI.

The numerous rulings of the District Court on the admission and exclusion of evidence, to which exception was taken, as well as the instructions to the jury based on the same thory, were unquestionably prejudicial. While the merit of these asserted errors is involved in the consideration we have already given to the questions of substantive law, it seems appropriate that they should be

noted in this summation. The respondents were required by the court to frame their case according to said rulings,[4] and it is manifest, we believe, that they were violative of settled rules of evidence, and that by the instructions excepted to and said rulings the respondents were deprived of a fair trial.

ARGUMENT.

I.

(a) It has long been the settled interpretation of the Fifth Amendment that value at the time of taking is the measure of the compensation to which the landowner is entitled when property is taken by the Federal Government in eminent domain.

Danforth v. United States, 308 U. S. 271, 84 L. ed. 240;

United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. ed. 566;

Olson v. United States, 292 U. S. 246, 78 L. ed. 1236;

United States v. New River Collieries Co., 262 U. S. 341, 67 L. ed. 1014, 43 S. Ct. 565;

Brett v. United States, 86 F. (2d) 305.

Such is the rule in California:

Code of Civil Procedure of California, Sec. 1249;

Sacramento etc. R. Co. v. Heilbron, 156 Cal. 408.

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[4]After ruling that the objection of counsel for the government to questions which did not eliminate increase in value due to the project should be sustained, the District Court required that valuation questions conform to the theory of said objection, viz., "The Court: You left out the Central Valley project, enhancement of the value by virtue of the Central Valley project. You left that out entirely. Include that * * *" (R. 242.)

In cases of inverse condemnation the property owner is entitled to compensation fixed by the same rule (*Phelps v. United States*, 274 U. S. 341, 71 L. ed. 1083; *United States v. Klamath etc. Indians*, 304 U. S. 119, 82 L. ed. 1219; *Jacobs v. United States*, 290 U. S. 13, 78 L. ed. 142; *Tilden v. United States*, 10 F. Supp. 377); and this court has repeatedly defined such compensation as being the "full equivalent" of value at the time of taking paid contemporaneously with the taking. (*Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *Jacobs v. United States*, 290 U. S. 13; *Phelps v. United States*, 274 U. S. 341; *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 51 S. Ct. 229, 75 L. ed. 473.)

All of the foregoing decisions of the Supreme Court have been rendered since the decision in the case of *Shoemaker v. United States*, 147 U. S. 282; 37 L. ed. 170, and yet in none of said cases has said *Shoemaker* case been cited or construed as supporting the contentions advanced by petitioner, and applied in this case by the District Court, in respect to the measure of compensation or the proof of value and damages that is admissible in actions where land is condemned for a federal project.

It is clear that if, as the present rule requires, the full equivalent of value at the time of taking is the proper standard of compensation, the proposal to exclude the increase in value due to the announcement of the project when the Government seeks to condemn for a public improvement means a reduction in the measure of compensation below the present constitutional guaranty. If the contention of petitioner in this case be accepted, then it must be held that the interpretation of the Fifth Amend-

ment, as settled by the decisions of this court, is to be modified.

It would also mean that the landowner would receive for his property in the case of condemnation by the Federal Government for a public improvement a lower standard of compensation than he would receive when his land was taken in eminent domain by another condemnor.

Neither the decision in the *Shoemaker* case, nor any of the other decisions of this court cited in petitioner's brief, support or warrant the adoption of such a rule, or sustain the rulings of the District Court which were the subject of the appeal in this case.

That the value of property taken by the Government for a public improvement should be determined without regard to any increase or decrease resulting from the Government project is expressly declared to be the rule in the recent case of *Murray v. United States*, 130 F. (2d) 442.

The reasons which are urged by petitioner in support of this effort to modify the long accepted standard of just compensation are rested in large part upon grounds of expediency and public policy, but such considerations do not warrant such a fundamental change in a matter that affects so closely the constitutional safeguards to be found in the Fifth Amendment. This court has held that the rule for which respondents contend applies with all its force, notwithstanding the taking be for war purposes; that war does not suspend the Fifth Amendment. (*United States v. New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014, 43 S. Ct. 565.) The necessities of the Government in time of peace cannot justify the adoption of a rule less favorable to the landowner. In said decision the court said:

"Section 10 of the Lever Act, in obedience to the 5th Amendment, provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. United States v. L. Cohen Grocery Co., 255 U. S. 81, 88, 65 L. ed. 516, 520, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." (Opinion 262 U. S. 344, 76 L. ed. 1017.)

This court more than once has declared the principle that constitutional provisions for the security of person and property are to be liberally construed, and that it is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. (*Byars v. United States*, 273 U. S. 28, 71 L. ed. 520.) It seems appropriate, as we are concerned with such a fundamental issue, to quote here from the case of *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622, in which the court said:

"In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

To which declaration this court in the *Olson* case added:

"The statement in that opinion that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes."

It is a significant fact that said case of *Monongahela Nav. Co. v. United States* was decided by the same court, with one exception, that decided the *Shoemaker* case, and within three months after that decision was announced; and yet the court in the *Monongahela* case declared and held without qualification that the just compensation guaranteed by the Fifth Amendment "must be a full and perfect equivalent for the property taken". The decisions of this court have ever since been uniform in the enunciation of that rule.

Aside from the fact that the proposition for which petitioner here contends is contrary to the settled rule, it is apparent that it involves an unreasonable and impracticable mode of procedure, and advocates a measure of compensation that is incapable of just ascertainment. It immediately suggests the question: "How is the amount of the increase in value due to the announcement of a project to be ascertained and determined, particularly when a considerable time elapses before a proceeding in eminent domain is instituted?" It is obvious, we believe, that the answer must be that such increase cannot reasonably be appraised or estimated but in each case will be a matter of conjecture. As has been said of general benefits, it is purely conjectural and incapable of estimation. For instance, as we have noted supra, there was absolutely no evidence in this case as to the amount of such increase, nor, in fact, any proof that any such increase had occurred, so that the witnesses who were required to consider and exclude that element, in giving the answers permitted, and the jurors who were instructed not to consider it in reaching a verdict, were obliged to deal with something illusive.

To charge against the landowner's compensation the increase in value due to the announcement of the project seems clearly to be contrary to the principle recently declared by this court in the decision in the case of *Danforth v. United States*, supra, in which it is said:

> "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Also, in said decision, it is declared:

> "The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified or appropriations may fail."

The decision in the *Danforth* case is cited in the decision of the U. S. Court of Appeals for the District of Columbia in the case of *Murray v. United States*, supra, in which that court said:

> "And the duty of the jury was to fix the value without regard to any increase or decrease resulting from the government project." (130 F. (2d) p. 444.)

See also:

United States v. Alcorn, supra.

II.

We believe that analysis is unnecessary to show that the decision in the case of *Shoemaker v. United States*, supra, is not authority for the far-reaching proposition that is

urged by the petitioner in this case, on the proper measure of compensation; and certainly it is not authority for the mode of trial adopted by the District Court. It is fair, to say, we believe, that the two instructions that were upheld in that decision must be construed as having application to issues which arose under the particular circumstances of that case.

It will not be deemed that the court intended in such a furtive manner to enunciate such an important modification of existing constitutional law.

Pertinent in the consideration of the *Shoemaker* case is the fact that the Central Valley Project was conceived and first undertaken as a State project, and was given wide publicity through the fact that it was submitted to the people of California at a general election on referendum, in which the legislation was ratified. By the Act of Congress of August 26, 1937, as is stated in petitioner's brief, the project was *reauthorized*, the matter having been the subject of previous action by the Congress subsequent to the aforementioned election in California. Further, it is to be noted that it was the Act of May 9, 1938 (Appendix to the Brief for the United States, pp. 33-34), in which condemnation for the relocation of the railroad and the making of the necessary arrangements with the Central Pacific Railroad was authorized.

There is another feature of the *Shoemaker* case that merits consideration in dealing with its application to the present case, and that is the fact that the commission in that case, as it appears from the decision, was dealing only with the value of lands taken, and the two instructions upon which petitioner rests its arguments here do not

appear to have had any relation to the question of fixing severance damages.

Under the facts shown in the present case, severance damages were an important and substantial issue, involving, according to respondents' witnesses, many thousands of dollars, and yet the District Court, following the argument of counsel for the Government based on the *Shoemaker* case, applied to the proof of damages to the land not taken the same limitation that witnesses were required to follow in giving their testimony as to the value of the land in the railroad right of way.

As regards the instruction in the *Shoemaker* case against receiving evidence of sales of similar property subsequent to the passage of the act authorizing the park, respondents here have never contended that proof of such sales was competent, nor did they offer proof of such sales in the District Court. As noted in the statement of the case, supra, a qualifying question as to familiarity with sales was asked of one of the witnesses, but the California rule was observed, that evidence of sales of other lands in the vicinity is not competent on direct examination. It may properly be said, we believe, that no issue arose in the District Court to which the first instruction dealt with in the *Shoemaker* case applies.

In a later decision this court appears to have defined the interpretation and effect to be given to the decision in the *Shoemaker* case. We refer to the case of *United States v. Chandler-Dunbar Co.*, supra, where it is said:

> "The value should be fixed as of the date of proceedings, and with reference to the loss the owner sustains, considering the property in its condition and situation

at the time it is taken, and not as enhanced by the purpose for which it was taken. Kerr v. South Park Comrs., 117 U. S. 379, 387, 29 L. ed. 924, 927, 6 Sup. Ct. Rep. 801; Shoemaker v. United States, 147 U. S. 282, 304, 305, 37 L. ed. 170, 186, 187, 13 Sup. Ct. Rep. 361." (229 U. S. page 76, 57 L. ed. 1080.)

We do not believe that any useful purpose will be served by extending this brief with a discussion of the other authorities cited in petitioner's brief.

III.

The claim of petitioner that increase in value due to the announcement of the project should be excluded from consideration in fixing the compensation to be paid to the owner is essentially the same as claiming that a deduction or offset should be allowed for general benefits, common to the community. It is now the generally recognized rule that such benefits should not be set off against the damages recoverable in condemnation. The rule is the same in determining the compensation to be paid for the land taken and in fixing the damages to the remaining land. (18 Am. Jur. 944.) A sound basis for the rule is derived from the circumstance that the landowner pays for his share of such benefits through the payment of taxes, and should not be charged again for a benefit which the other landowners enjoy without payment.

Special or direct benefits, on the other hand, may be set off against the value of the land taken or the damages to the remaining land. (*Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270.) The Circuit Court of Appeals, in a similar

condemnation suit arising out of the construction of the Bonneville power project, has expressly held that increase in the value of the defendants' land, due to its proximity to the project, is not a special or direct benefit to the land not taken. (*United States v. Alcorn*, supra.) The opinion in that case discloses that the Government was advancing the same claim there as it is urging here concerning increase in value.

This matter of special or direct benefits is now covered by an Act of Congress,[5] that is cited in said decision of the Circuit Court of Appeals in *United States v. Alcorn*, and that decision, we believe, is authority for holding that only special and direct benefits are an offset in the cases covered by that particular statute, which would embrace this project.

IV.

In the court below one of the grounds of appeal urged by respondents was their claim that the District Court had failed to observe and apply the California practice and mode of procedure in the trial of this cause. This

[5]U. S. C. A. Title 33, Sec. 595: "*Consideration of Benefits in Assessing Compensation.* In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals or waterways of the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken, or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement and shall render their award or verdict accordingly."

assignment of error was not discussed in the decision of the Circuit Court of Appeals, for in most aspects no necessity to consider it remained after the decision of the court on the main question in the case.

One of the rules in California that was invoked by respondents under said exception was the statutory rule as to the time when the value of property taken in eminent domain shall be fixed. The Code of Civil Procedure of California, Section 1249, expressly provides that value at the time of taking is the measure of compensation. See also, *Sacramento etc. R. Co. v. Heilbron*, 156 Cal. 408. This rule, as we have seen, was in harmony with the Constitution of the United States.

In cases in eminent domain the conformity act relates to practice, pleadings, forms and modes of proceeding.[6]

Excluding the statutes pertaining to the District of Columbia there is no federal statute which requires or provides a standard of compensation or a mode for the ascertainment of damages different from the law of California.

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(6) The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding.

U. S. C. A. Title 40, Sec. 258.

The proposition has long been settled that the laws of the State which the federal courts are found to follow under the judiciary act and the conformity act extend to and include rules of evidence prescribed by the statutes of the State and the decisions of the state court. (*Wright v. Bales*, 2 Black 535, 17 L. ed. 264; *Ryan v. Bindley*, 1 Wall. 66, 17 L. ed. 559.)

The practice of the State where the property is situated applies in actions in eminent domain brought by the Government. (*United States v. Certain Lands*, 39 F. Supp. 91; *United States v. Certain Parcels of Land*, 46 F. Supp. 441; *United States v. Tract of Land*, 72 F. (2d) 170.) There was no sanction under the rules of evidence in California for the questions propounded to the valuation witnesses at the direction of the District Court. Such questions, and the testimony elicited, required the assumption of a fact as to which there was no evidence, namely, that there had been an increase in value due to the Central Project after August 26, 1937. In brief, no foundation was laid for such testimony. Also, in giving the instructions to the jury involving the same element of supposed increase in value; the District Court disregarded a rule of procedure and practice in California, namely, that the giving of an instruction which finds no support in the record is improper, and if prejudicial is ground for reversal. (*Buttrick v. Pacific Elec. Ry. Co.*, 86 C. A. 136, 260 Pac. 588.) Viewing the matter of increase in value as really being a question of benefits, the District Court also failed to conform to the California practice, under which there can be no deduction for general benefits. (*Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083; *Los Angeles v. Marblehead L. Co.*, 95 C. A. 602, 273 Pac. 131.)

V.

The entry of judgment by the District Court in favor of petitioner and against respondents Miller, Humphrey and McConnell for the recovery of $650.00 from each of said respondents was unauthorized and erroneous for two reasons, (1) lack of due process, going to the jurisdiction of the court, and (2) that the recapture of the money that was paid to said land owners according to the provisions of the Declaration of Taking Act, by order of the court, was not intended by said Act; and that in the light of the Fifth Amendment the Act should not be interpreted as authorizing such a recovery.

It is acknowledged that the award was included in the judgment of the District Court, *sua sponte*, without notice, process or a hearing, though the money was lawfully in the possession of said respondents; or, what is more likely, had been spent by them. The District Court had ordered the payment of the money, as the statute authorized, and no proceeding to vacate said order was taken or suggested before the entry of the judgment. Timely objection to the award was made before the District Court, following notice of the entry of judgment. (R. 126-130.)

The summary entry of the judgment awarding recovery of said money to petitioner was without due process of law.

Garfield v. United States, etc., 211 U.S. 249, 53 L. ed. 168;

Standard Oil Co. v. Missouri, 224 U.S. 270, 56 L. ed. 760;

United States v. Goldstein, 271 Fed. 838, 845.

We believe that the language of the court (opinion by Mr. Justice Day) in the *Garfield* case, supra, may appropriately be quoted here, viz.:

> "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.
>
> The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

The foregoing objection to the judgment goes to the jurisdiction of the court. A decree, in so far as it undertakes to decide issues not made by the pleadings, is *coram non judice* and void. (*Osage Oil etc. Co. v. Continental Oil Co.*, 34 F. (2d) 585; *Baar v. Smith*, 201 Cal. 87, 99, 255 P. 827; *Kelley v. Benton*, 179 F. 466.)

There is the further question whether the Declaration of Taking Act is to be interpreted as justifying judgment against a land owner for the recovery of the amount, in excess of the jury's verdict, that may previously have been paid to him out of the deposit that must be made in the District Court under the procedure of said Act when title to his land is taken and vests in Government.

It is the contention of the respondents affected by said award that the language of the statute does not sustain

such an interpretation, and that if it were to be given such an interpretation rights assured to property owners by the Fifth Amendment would be denied.

The following provisions of the statute negative any implication that the government is entitled to judgment against a landowner for the return of any part of the money deposited in the registry of the court, and withdrawn by the landowner in pursuance of the act, viz.:

(a) The deposit in the court is made "to the use of the persons entitled thereto";

(b) Upon the filing of the declaration of taking and such deposit in the court, "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America;

(c) "Interest shall not be allowed on so much" (of the final award) "as shall have been paid into the court";

(d) "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding";

(e) In case the compensation finally awarded "*shall exceed* the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

The Act, U.S.C.A., Title 40, Sec. 258a, is printed in the appendix, infra.

According to the first paragraph of the Act the Government, in filing the declaration of taking, declares that the

lands "are thereby taken for the use of the United States", and the deposit being made, title to the lands taken vests in the United States. In construing the statute it must be assumed that the words "the use of" were employed in the same sense in both instances in which they appear.

Had the intention been that a landowner must restore any money paid to him from the deposit, assuming such a requirement would be valid under the Fifth Amendment, such a condition would have been definitely expressed and incorporated in the statute, for it cannot properly be supplied by implication in view of the other provisions of the statute.

If serious consideration is given to the provisions of the Act limiting the allowance of interest that may be paid upon the amount that is finally awarded, and denying interest on the sum deposited, and, with the other features of the statute, the legislation is tested by the requirement of the Fifth Amendment that the owner of the property condemned is entitled to the *full equivalent of the value at the time of taking paid contemporaneously with the taking*, we believe that it must be concluded, to sustain the validity of the Act, that the landowner has an absolute right to the amount that is deposited for his land in the registry of the court.

Applying to the situation the established measure of compensation as defined in the decisions of this court, it is apparent that in order to sustain the Act as being constitutional, which is the interpretation to be sought, it must be held that the amount of the deposit is intended to *be a a contemporaneous and unconditional payment "for or on*

account of" the just compensation for the land which vests in the landowner as his property absolutely, and upon which accordingly no interest is to be paid, and with the right to such additional or excess amount if any, over and above the said deposit, as may be found to constitute the value on the date of taking, with interest on such additional excess amount from the date of taking to the date of payment.

It is not to be supposed that Congress intended to place the landowner in such a situation as would be presented if the theory of appellee is adopted, which may be summarized briefly as follows:

> If you fail to withdraw and use the money deposited in the court and the jury brings in a verdict for said amount or more, you will lose interest on the amount you fail to withdraw and use; if you could not withdraw and use the money, no interest being allowed thereon, your constitutional rights would be invaded, but if you withdraw and use the deposit, so as to compensate for the loss of use of your property, and a lesser amount is finally awarded, then you will be under obligation to pay back a part of the moneys thus withdrawn and used, and if you do not have that amount you will suffer the embarrassment of having a legal obligation which you may be unable to meet; that is to say, for taking your land we offer you a *dilemma.*

Surely the guaranty of the Fifth Amendment is something more definite and secure.

Under a proper interpretation of the Act the respondents Miller, Humphrey and McConnell are entitled to retain the money that was paid to them out of the registry

of the court. (See *United States v. Certain Lands*, 39 F. Supp. 91; *United States v. 266.25 Acres of Land*, 43 F. Supp. 633.)

VI.

The asserted errors of the District Court in the trial of this cause are already quite fully presented in the foregoing argument and no further discussion of the exceptions under that head appears to be warranted. That said errors would tend to prejudice the jury seems manifest. In such a case judgment will be reversed. (*Columbia P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405.)

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Dated, Redding, California,
November 6, 1942.

FRANCIS CARR,
Attorney for Respondents.

J. OSCAR GOLDSTEIN,
R. P. STIMMEL,
CARR & KENNEDY,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

SPECIFICATIONS OF ERROR

Appeal of Victor N. Miller, John J. Humphrey and Charles J. McConnell. (Parcel No. 7.)

1. The court erred in its rulings on the admission and rejection of evidence as follows:

(a) The court erred in sustaining appellee's objections to the testimony of respondent Humphrey as to the fair market value of Parcel 1 of the land condemned on the date of taking, and in rejecting such testimony.

The Question:

"Q. I will ask you to state what was the fair market value of that particular piece of land or that tract of land on December 14, 1938?"

The Objection:

"Mr. Landrum. Just a moment. That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, no foundation laid, in the further ground and further reason that it includes within itself any increased value in this property due to the Central Valley Project." (R. 232.)

"Mr. Landrum. My objection to this question—and it is important—goes to its form, in that it doesn't eliminate from the answer any increased value over the value of the the property due to the Central Valley Project. If he will ask the value, forgetting—excluding any increase in the value due to the project, I will have no objection, but his question is going right back to the very thing the Supreme Court in the Shoemaker case says he can't do." (R. 233.)

(Exception noted and allowed, R. 240-241.)

(b) The court erred in sustaining appellee's objections to the testimony of the witness Francis E. O'Connor (valuation expert for appellants) as to the fair market value of Parcel 1 and Parcel 7 of the land condemned on the 14th day of December, 1938, and in rejecting such testimony. The grounds of objection urged by counsel for the Government were stated as follows:

The Question:

"Q. Calling your attention first then to Parcel No. 1 comprising approximately 3.17 acres located in the Rouge Tract, I will ask you to state what in your opinion was the fair market value of that particular tract of land referred to here as Parcel No. 1 on the fourteenth day of December, 1938?"

The Objection:

"Mr. Landrum. Just a moment, that is objected to upon the ground and for the reason that it includes within itself any increase or increment to that property due to the Central Valley Project.

The Court. The objection is sustained." (R. 299.)

The Question:

"Q. What in your opinion—we reserve an exception, your Honor, to the ruling—what in your opinion, Mr. O'Connor, was the reasonable market value of the property described in Parcel No. 7 referred to here as the Kelly Tract, comprising approximately 10.61 acres on the fourteenth day of December, 1938?"

The Objection:

"Mr. Landrum. Same objection, your Honor.

The Court. Same ruling.

Mr. Goldstein: Take an exception to your Honor's ruling." (R. 300.)

(Exceptions reserved, R. 299-300.)

(c) The court erred in excluding the testimony of Jonathan Tibbets as to the market value of said lands on December 14, 1938. (Objections and exceptions by stipulation, R. 301.)

(2) The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, Thomas G. Mapel, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment due to the Central Valley Project from the 26th day of August, 1937. (R. 454.)

Respondents' objection went to lack of qualification for the witness to give valuation testimony, as well as the incompetency of the testimony as to value with the increase in value excluded.

On direct examination, over appellants' objections, the witness gave his valuation testimony in respect to each parcel of land sought to be taken, in response to the questions by Government counsel in which the witness was asked his opinion as to market value, or damages, as of December 14, 1938, leaving out and excluding from consideration any increase or increment due to the Central Valley Project from and after August 26, 1937.

Later, on cross-examination, the witness admitted that in giving his valuation testimony, he eliminated any and all possible increment in value due to the project whether it arose before or after August 26, 1937.

Cross-Examination.

"A. It was necessary to take into consideration that the project would have—would reflect a value in the district by reason of it, you would have to take that into consideration, but the appraisal was made dismissing it.

Q. Completely?

A. *Completely.*

Q. All right. So we will understand this clearly, the appraisal and the figures that you testified to before this jury eliminated completely any consideration or question, whether economic or financial, anything pertaining to the Central Valley Project?

A. That is correct." (R. 387.)

"A. The figure that I expressed is an estimate of the fair market value of the several parcels of land involved in this suit—expressed value—a market value, taking into consideration no increment in value by reason of the project." (R. 388.)

"Q. You went further, didn't you, you eliminated everything from that property in connection with the Central Valley Project from December, 1933, clear on up to August 26, 1937, didn't you?

• • • • • • •

A. Yes." (R. 393.)

(e) The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, F. C. Herrmann, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment

due to the Central Valley Project from the 26th day of August, 1937. (R. 454.)

The objection of appellants to the testimony of said witness was embraced in a stipulation made by counsel in open court. (R. 406-407.)

Rulings similar to those given above on the part of the defendants Miller, Humphrey and McConnell, in relation to evidence of value offered on the part of defendants Johnson and Agnew, were made by the district court during the trial. (R. 323, 337, 338, 343, 351-353.)

The court erred in its charge to the jury, by giving the following instruction requested by the appellee:

> "The government may not be required to pay any increase in the value of the property which it has caused by reason of its contemplated taking of the property by eminent domain proceedings. Any rise in value before the taking should be allowed to the property owners but not any rise caused by the expectation that the government intended to condemn the property.
>
> "As you have already heard, this property is being taken for the so-called Central Valley Project. If the announcement of, plans for, or the carrying out of that project has increased or enhanced the value of the lands involved in this case, since or after August 26, 1937, such increase or enhancement in value is not to be considered by you. The value you are to fix and award as compensation is the value this land would have had had this project not been announced, planned or constructed on August 26, 1937. It may be that because of this project the use for which the property is suited may have changed. You should consider it only for the use to which it was suited or adapted before that use was changed by the project. The gov-

ernment must not be required to pay for something it has itself made." (R. 428-29.)

Said instruction was Plaintiff's Instruction No. 13. (R. 84.) Objection to same was made by appellants before the district judge on the following grounds:

That the instruction violated the constitutional rights of the defendants under the Constitution of California and the Federal Constitution, and was contrary to law;

That just compensation is value at the time of the taking;

That the giving of said proposed instruction by the court would be prejudicial to the rights of defendants, and a verdict in accordance with such instruction would be unjust.

(Exception reserved and allowed, R. 444-45.)

(i) The court erred in its charge to the jury by giving the following instruction requested by appellee:

"You are instructed that this acquisition or project was authorized by an Act of the Congress of the United States approved August 26, 1937, and I instruct you that you may not consider and include in your verdict any increase in value of these lands which may have occurred from and after that date which you may find was attributable to the announcement of plans for or construction of this project." (R. 429.)

Said instruction was Plaintiff's Instruction No. 13a.

(Exception reserved and allowed, R. 444-45.)

(k) The court erred in its charge to the jury by giving the following instruction requested by the appellee:

"Although the value of the land taken by the government must be estimated on the basis of its value for all purposes including its value as a potential subdivision (if you find that it has a value as such potential subdivision *which was not due to the project itself*), nevertheless you may not take into consideration the price that its owners might have been able to obtain for the land after such subdivision had actually taken place." (R. 429-430.)

(Exception reserved and allowed, R. 444-45.)

Said instruction was Plaintiff's Instruction No. 18. (R. 89.)

(k-2) The court erred in failing to apply and follow the law of California.

(m) The court erred in entering judgment in said cause in accordance with the verdict of the jury.

(n) The evidence is insufficient to justify the verdict of the jury in respect to the damages suffered by said appellants by the taking of their respective parcels of land and said verdict is against law.

(o) The compensation and damages awarded to said appellants by the verdict and judgment herein are ridiculous, inadequate and unjust.

(p) As a result of the errors of the District Court in its rulings upon the admission and rejection of evidence and errors in the charge to the jury, and as a result of the entry of judgment in accordance with the verdict of the jury, said appellants:

(1) Were deprived of the just compensation for their respective properties guaranteed to them under the provisions of the Constitution of the United States and the Constitution of the State of California;

(2) Were deprived of their respective properties without due process of law in violation of their rights, privileges and immunities under the provisions of the Constitution of the United States.

On the part of defendants Miller, Humphrey and McConnell it was further specified that the court erred in awarding judgment against the defendants Miller, Humphrey and McConnell for the sum of $650 each.

DECLARATION OF TAKING ACT.

Section 1 of the Act of February 26, 1931, 46 Stat. 1421-1422 (U. S. C., title 40, sec. 258 (a)), provides:

That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just

compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.